JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 13.

OCTOBER TERM, 1959.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

FRED N. ACKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

The Petitioner's brief can be summarized as follows:

1. An open admission that the wording of the statute in itself does not impose a double penalty.

2. Nevertheless a double penalty ought to be imposed in the circumstances of this case for the following reasons:

(a) The Regulations provide for it.

(b) The Legislative Conference Report contains language identical to the Regulations.

(c) Congress has not specifically interfered with Treasury in administratively imposing the double penalty.

(d) The additional penalty at the rate of 6% is in the nature of interest and therefore no injustice is done.

More noteworthy than anything that is said on the positive side of the Government's case is the complete absence of any citation that sustains the philosophy of their position and at the same time supports it by a thoroughgoing and reasoned opinion.

Over and above this it strikes this Respondent that if it takes 27 pages of explanation to support their contention for a double penalty that is not expressly stated in the statute then the power to impose the double penalty does not in fact exist.

Quite properly the whole thing can be put down to administrative overinterpretation.

The argument of the Government that the statute should be expanded to include the Treasury Regulations and the Legislative Conference Report is legally unsound because there is nothing in the statute that is ambiguous. There is no need for interpretation. What the Petitioner is trying to introduce is an entirely new concept. Secondly, to impute to Congress an intent about anything in the Internal Revenue Code beyond a rough knowledge of the prevailing rates is to distort fact out of all reality. The Treasury writes or directly inspires the Conference Report, the Code itself and, of course, the Regulations.

Frankly, everybody including the Treasury is lost in the sea of their own confusion when it comes to the Internal Revenue Code. To my best knowledge the Treasury has not to this day been able to write a full set of Regulations for the 1954 Revenue Code, a Code that was advertised as clearing up the disputes in the 1939 Code. Now, if the Treasury does not itself understand its own work how can it impute such knowledge to the Congress?

The Government's argument that the silence of the Congress sanctifies the administrative imposition of the double penalty is far fetched. Firstly, the Congress also

watches the decisions of the Courts, where on balance the Government is the loser. Secondly, the record of the Congress is full of promises of a thorough-going overhauling of the Internal Revenue Code. But it always gets lost in the heat of the Washington summer, which phrase is used to cover a multitude of legislative omissions.

The final argument of the Government that the double penalty is in the nature of interest and therefore ought to be upheld is totally unsound. Why any thinking lawyer would spend three whole pages of a brief discussing the non-pertinent question of interest and then refer and re-refer to it constantly leaves the writer puzzled. Just how far can reason be stretched before all logic ceases? To call it interest or like interest does not justify anything. Either Congress has definitely imposed a penalty or it has not. It is not a case of maybe this or maybe that but a case of yes or no.

RESPONDENT'S ARGUMENT.

The Respondent's position can be plainly stated. The Statute provides for two distinct situations and an equally distinct penalty for each situation as follows:

1. 10%, for failure to file an estimate.

2. 6%, for an underestimate of the estimate with a 20% factor of error.

If we apply one of the very oldest maxims of interpretations we get a self-evident answer. "The express mention of one thing is the exclusion of the other."

Frankly, there is little else that needs be said. However, we might indulge in a little logic and say that "the whole includes all of the parts."

Let us look at the question affirmatively. If Congress either with or without the so-called Conference Reports

wanted to impose a double penalty they could have done so plainly and in a single sentence. Not having done so it does not lie in anyone's power to put it in their mouth. Nor is it necessary to remind this Court that penalties are not favored in the law unless they are clearly expressed.

THE CASES.

We do not trouble the Court by citing a series of cases either pro or con, because the cases themselves have very little meat in them. Why? Because the cases were preponderately over other questions and penalties were side issues. The opinions themselves treat the penalties in this light and little space or none is spent in discussing them beyond declining or granting the penalty. We do however append as an appendix that part of the Court of Appeals decision in the instant case (258 F. 2nd 568) referring to penalties because it does attempt to analyze and weigh the respective merits pertinent to this situation.

Respectfully submitted,

FRED N. ACKER,

Pro Se.

APPENDIX.

Excerpts from Opinion of the United States Court of Appeals for the Sixth Circuit in the Case of Acker v. Commissioner, 258 F. 2d 568.

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax both under § 294(d)(1)(A) for failure to file a declaration of estimated tax, and under § 294(d)(2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not . . . willful neglect" to justify his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under § 294(d)(1)(A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a valid exercise of the taxing power conferred by Article I, § 8, and the Sixteenth Amendment of the Constitution. [*Erwin v. Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker v. United States*, 240 F. (2d) 604 (5th Cir.), *cert denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under §§ 294(d)(1)(A) and 294(d)(2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of § 294(d)(2). This holding is in accord with Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence F. Buckley*, 29 T. C. No. 50 (1957); *Marcel Garsaud*, 28 T. C. 1086, 1090 (1957); *Harold C. Marbut*, 28 T. C. 687, 692 (1957); *J. D. Abbott*, 28 T. C. 795, 808-809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861-862 (1957); *Walter H. Kaltreider*, 28 T. C. 121, 126 (1957); *Marvin Maxey*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 102 (10th Cir. 1954)]; and by some District Court decisions [*Palmisano v. United States*, 159 F. Supp. 98 (E. D. L. A. 1958); *Farrow v. United States*, 150 F. Supp. 581 (S. D. Cal. 1957); *Peterson v. United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this Court has affirmed three Tax Court decisions which have sanctioned imposition of penalties under both § 294(d)(1)(A) and § 294(d)(2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in these cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all had been filed was not raised in this Court. [*John Federika*, 14 CCH Tax Ct. Memo. 652, 658 (1955), *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*, 237 F. (2d) 918 (6th Cir. 1956); *R. M.*

Clayton, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd.*, per *curiam*, 245 F. (2d) 238 (6th Cir. 1957).| The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax |Int. Rev. Code of 1954, §§ 6651(c), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241-5242|, the problem remains an important one because of cases yet to be decided which will be ruled by the 1939 Code |see Int. Rev. Code of 1954, § 6654(h)|.

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294-1(b)(3)(i) |26 C.F.R. (1949)| declaring that "|i|n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano v. United States*, *supra*, 159 F. Supp. 98, and *Farrow v. United States*, *supra*, 150 F. Supp. 581. |See also *G. E. Fuller*, *supra*, 20 T. C. at 316.|

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. |See *Barnwell v. United States*, 58-1 U.S.T.C. Par. 9374 (E. D. S. C. Feb. 4, 1958).| For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided separate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing

another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter, supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294(d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephan v. Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnwell v. United States, supra*, 58-1 U.S.T.C. Par. 9374; *Davis v. Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott v. Railroad Co.*, 99 U. S. 573, 576 (1878); *United States v. J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc. v. Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States v. Merriam*, 263 U. S. 179, 187-188 (1923); *Crooks v. Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke v. Gardner*, 277 U. S. 239, 244 (1928); *Gould v. Gould*, 245 U. S. 151, 153 (1917); *cf. Parker Pen Co. v. O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation

111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner v. South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States*, *supra*, 58-1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57-2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stenzel v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57-1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57-2 U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass v. Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States v. Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States v. Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292(d)(2).

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute . . . because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 § 29.294-1(b)(3)(i), 26 C.F.R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1943 Cum. Bull. 1314, 1345), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen v. Commissioner*, F. 2d (5th Cir., July 23, 1958). *Abbott v. Commissioner*, F. 2d (3rd Cir., July 31, 1958), and *Hansen v. Commissioner*, F. 2d (9th Cir., Aug. 4, 1958). These decisions, rendered subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939 § 294(d)(1)(A)] and the penalty for substantial underestimation of estimated tax [*id.* § 294-(d)(2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Fogel v. Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clayton v. Commissioner*, 245 F. 2d 238 (6th Cir. 1957). See also 3 Roehner, Federal Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294(d)(2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of

estimated tax is filed." |*Abbott v. Commissioner*, *supra*, F. 2d at | The Court then observed that "|t|he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent". |*ibid.*|; and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." |*Ibid.*|

In the *Hansen* case the learned Court of Appeals for the Ninth Circuit likewise concluded from the legislative history that "|n|o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. |*Hansen v. Commissioner*, *supra*, F. 2d at .|

However, it has long been our view that "|such an| intention of the Congress must be gathered from the language of the Act. . . ." |*United States v. Stroop*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins v. Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).|

"Further," as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well-settled that in the application of penalties, 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'" |*Hatfried, Inc. v. Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).|

While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be en-

titled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art. I, §§ 7, 8, clause 1; Amend. XVI; see *Langstaff v. Lucas*, 9 F. 2d 691, 692-693 (W. D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th Cir.), *cert. denied*, 273 U. S. 721 (1926); *Masonite Corp. v. Fly*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering v. Rebsamen Motors, Inc.*, 128 F. 2d 584, 587-588 (8th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States v. Calamaro*, 354 U. S. 351, 358-359 (1957); *Koshland v. Helvering*, 298 U. S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U. S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit-Sharing Trust v. Commissioner*, 190 F. 2d 326, 330 (6th Cir. 1951); *Langstaff v. Lucas*, *supra*, 9 F. 2d at 692-693; see *United States v. Abrams*, 197 F. 2d 803, 805 (6th Cir.) *cert. denied*, 344 U. S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law." [*Morrill v. Jones*, 106 U. S. 466, 467 (1882).]